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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 738

GENERAL MOTORS CORPORATION (As Transferee in Complete Liquidation of Walter J. Bemb, Inc.),
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

Benjamin E. Jaffe,
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Note.—For other citations see index and brief in petition filed simultaneously herewith in *United Motor Service, Inc.*, v. *United States*, incorporated in this petition by reference.

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THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

The petitioner, by its attorney, prays that a writ of certiorari issue, to review the judgment of the Court of Claims of the United States entered in this case on November 12, 1940, sustaining respondent's demurrer and dismissing petitioner's petition.

Opinion Below.

The opinion of the Court of Claims (R. 21-27) is reported in 35 F. Supp. 466.

Jurisdiction.

The judgment of the Court of Claims of the United States was entered on November 12, 1940 (R. 27). The jurisdiction

of this Court is invoked under the Act of February 13, 1925 (c. 229 #3, 43 Stat. 936), as amended by the Act of May 22, 1939 (c. 140, 53 Stat. 752).

Questions Presented.

1. Whether Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Whether said Sections of said Act, impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4, of the Constitution of the United States.

Statutes Involved.

This will be found in the Appendix, *infra*, pp. 8-10.

Statement.

The facts as set out in the amended petition, and as admitted by respondent's demurrer (R. 21) are substantially as follows:

This is a suit against the United States for the recovery of capital stock taxes paid by the petitioner for the years ended June 30, 1933, and June 30, 1934 (R. 1-2) and is based upon the ground that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, are unconstitutional (R. 8-12).

The petitioner, General Motors Corporation, is a Delaware corporation, with its offices and principal place of business at Detroit, Michigan. Walter J. Bemb, Inc., was a Delaware corporation, organized on May 5, 1933, with an authorized capital stock of 2,000 shares of Class A common stock of the par value of $75 per share and 6,000 shares of

Class B common stock of the par value of $25 per share. Walter J. Bemb, Inc., commenced to do business on May 20, 1933, and engaged in the business of selling automobiles, parts, and accessories, and the servicing of automobiles (R. 3). The outstanding capital stock of Walter J. Bemb, Inc., during its corporate existence, was as follows: Immediately after organization—1,093 shares of said Class A common stock; at December 31, 1933—1,480 shares of said Class A common stock; at December 31, 1934, and until the date of the dissolution on June 27, 1935—1,813 shares of said Class A common stock (R. 3).

The outstanding common stock was wholly owned and paid for in cash by General Motors Holding Corporation, a subsidiary of General Motors Corporation, petitioner herein (R. 3). On June 27, 1935, Walter J. Bemb, Inc., transferred its assets to its parent company, General Motors Holding Corporation, in cancellation of the outstanding shares of its capital stock, and on June 27, 1935, Walter J. Bemb, Inc., was dissolved. Subsequently, on November 30, 1936, General Motors Holding Corporation transferred its entire assets to its parent company, General Motors Corporation. At or about the same time, General Motors Holding Corporation was dissolved (R. 2).

The net sales, gross profit and net losses of Walter J. Bemb, Inc., for the period from May 20 to December 31, 1933, for the calendar year 1934, and for the period from January 1, 1935, to June 27, 1935, were (R. 3):

	Net Sales	Gross Profit on Sales	Net Losses
May 20 to December 31, 1933	$1,190,057.26	$197,285.71	$11,653.18
Calendar Year 1934	1,298,092.16	191,470.21	22,817.46
January 1, 1935, to June 27, 1935	395,424.92	53,522.05	11,606.34

The net worth of Walter J. Bemb, Inc., according to its books of account as at the time of the filing of its capital stock tax returns for the year ended June 30, 1933, and the year ended June 30, 1934, and as at June 27, 1935, was (R. 3-4):

At the time of filing capital stock tax return, June 30, 1933	$111,000.00
At the time of filing capital stock tax return, June 30, 1934	101,463.38
At June 27, 1935	95,020.17

Prior to the time for filing of the capital stock tax return for Walter J. Bemb, Inc., for the year ended June 30, 1933, the persons charged with the responsibility of determining the value to be declared for capital stock tax purposes gave consideration to the question. It was estimated that earnings of 30% on invested capital could be expected during very good business years. It was known that during the four preceding years of the depression period some dealerships in Detroit, Michigan, earned nothing on investments therein. However, it was hoped that business conditions would improve and in order to leave a margin of safety it was determined to declare a value which would permit net earnings of approximately 50% on the invested capital in any year without incurring any liability for excess-profits tax. The invested capital at this time was $111,000.00 and the value to be declared was determined at $500,000.00. The same method was used in determining the value to be declared for the year ended June 30, 1934. At the time the declared value for capital stock tax purposes was determined for the year ended June 30, 1934, the invested capital of Walter J. Bemb, Inc., was $135,975.00 and the declared value was determined at $544,000.00 (R. 4).

Specification of Errors to be Urged.

The Court of Claims of the United States erred:

1. In failing to hold that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the Due Process Clause of the Fifth Amendment.

2. In failing to hold that said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4, of the Constitution of the United States.

3. In sustaining the respondent's demurrer and dismissing petitioner's petition.

Reasons for Granting the Writ.

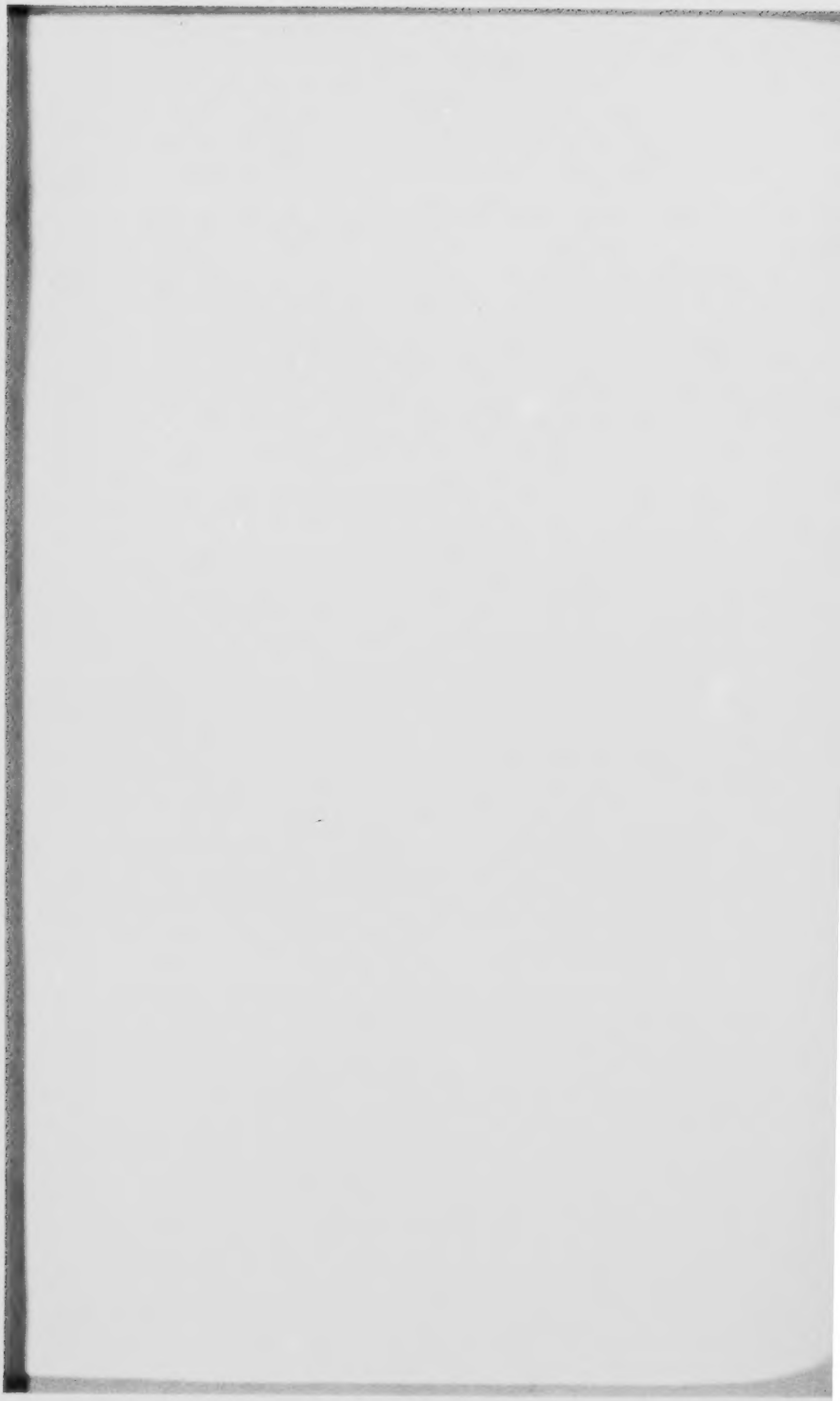
1. The Court of Claims of the United States in this case has decided an important constitutional question, which has not been, but should be, settled by this Court.

2. The decisions of the lower Courts are in conflict on the question as to whether the value of the capital stock required to be declared by the Acts in question, must have some reasonable relationship to actual or fair value, or whether the declared value is binding on the taxpayer regardless of actual or fair value.

a. In *Oertel* v. *Glenn,* 13 F. Supp. 651, the District Court (W. D. Ky.), in passing upon the capital stock tax provisions of the N. I. R. A., said—"If the Act here in question is construed to raise a conclusive presumption that the tax is to be levied on the declared value of the taxpayer, regardless of the actual value, it is violative of the Fifth Amendment." In *Allied Agents* v. *The United States,* 26

F. Supp. 98, the Court of Claims held that "the actual value is immaterial." In *Kentucky Fire Brick Co.* v. *Glenn,* 34 F. Supp. 35 (W. D. Ky.), the Court expressly rejected the interpretation of the Court of Claims and held "that the purpose of the Act is to impose a tax based on the fair and reasonable value of the stock, rather than upon an arbitrary value fixed by the taxpayer." In the instant case, the Court of Claims held that "while the statute did not require the use of the actual or fair value of the stock, the intent of the statute was that a fair valuation should be stated." In *Oertel* v. *Glenn,* 97 F. (2d) 495, the Sixth Circuit Court of Appeals held that "it is the intent of the statute that constitutes the law."

3. The Court of Claims has decided an important constitutional question in a way probably in conflict with applicable decisions of this Court.



BRIEF IN SUPPORT OF PETITION.

Reference to the opinion below, jurisdiction, a statement of the questions presented, facts in this case, specifications of errors to be urged, and reasons for granting the writ, will be found in the foregoing petition. The statutes involved are set out in the Appendix, *infra*, pp. 8-10.

Argument.

The opinion of the Court of Claims includes this case and the case of *United Motor Service, Incorporated* v. *The United States*, wherein a separate record, petition, and brief are being filed simultaneously herewith in this Court. We hereby incorporate by reference all of the arguments and authorities cited in the brief in support of the petition of *United Motor Service, Incorporated* v. *The United States*. In connection with the argument made in said brief that the retroactive features of Sections 215 of the N. I. R. A. and 701 of the Revenue Act of 1934, are violative of the Constitution of the United States, we here stress the fact that the petitioner was subjected to a capital stock tax for the year ended June 30, 1933, although it was not organized until May 5, 1933, and did not commence to do business until May 20, 1933.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States should be granted.

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APPENDIX.

Capital Stock and Excess-Profits Tax.

(Imposed by National Industrial Recovery Act of June 16, 1933.)

Sec. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 per each $1,000 of the adjusted declared value of its capital stock.

Sec. 215. (b) For each year ending June 30 there is hereby imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent to $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

Sec. 215. (c) The taxes imposed by this section shall not apply——

Sec. 215. (c) (1) To any corporation enumerated in section 103 of the Revenue Act of 1932;

Sec. 215. (c) (2) To any insurance company subject to the tax imposed by section 201 or 204 of such Act;

Sec. 215. (c) (3) To any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

Sec. 215. (c) (4) To any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

Sec. 215. (d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which

such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extensions shall be for more than sixty days.

Sec. 215. (e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

Sec. 215. (f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash

and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with the regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

Sec. 215. (g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Sec. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in Section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Sections 701 and 702 of the Revenue Act of 1934 are substantially similar to the above Sections.

Supreme Court, U. S.
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No. 788

In the Supreme Court of the United States

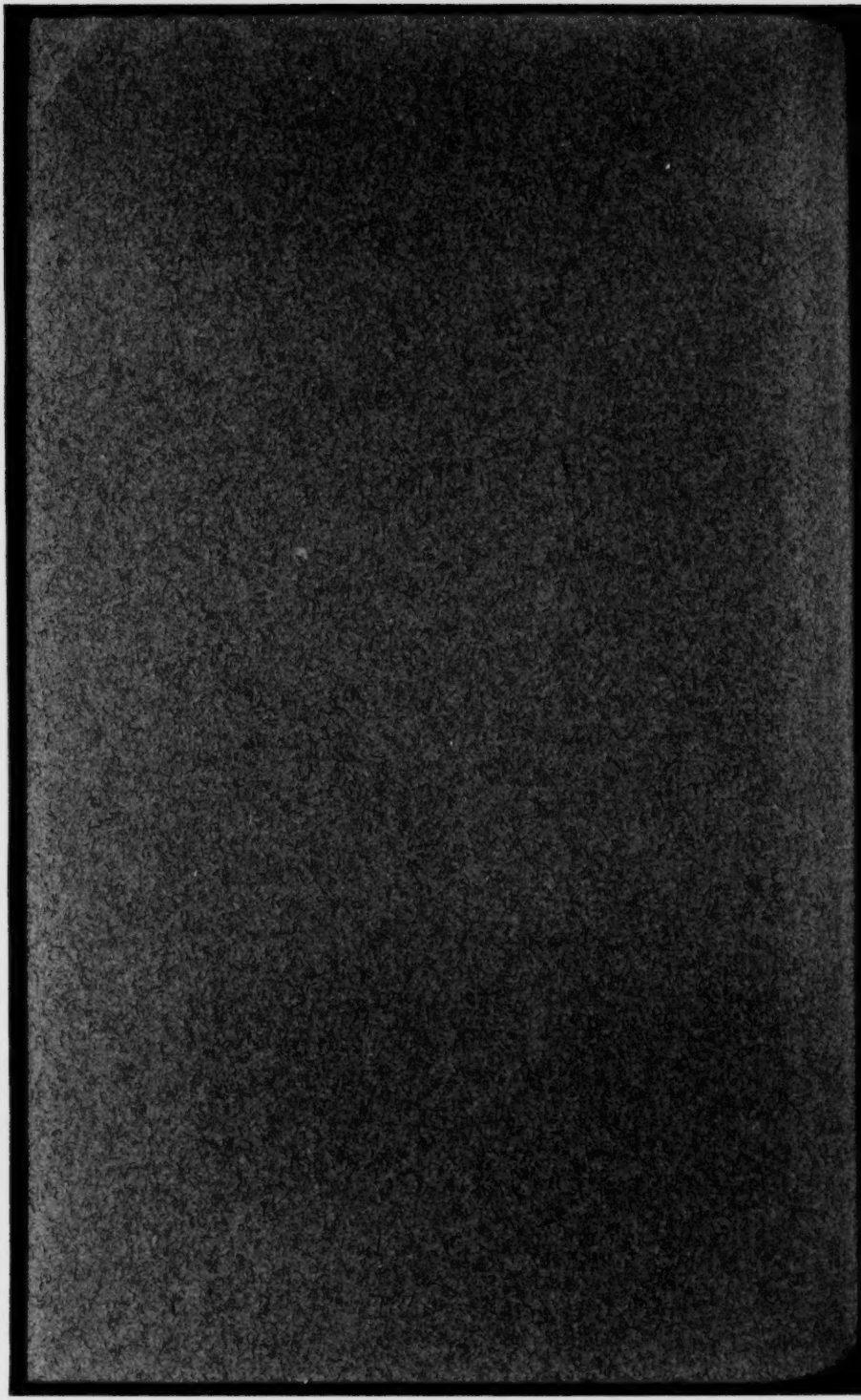
OCTOBER TERM, 1940

GENERAL MOTORS CORPORATION (AS TRANSFEREE IN COMPLETE LIQUIDATION OF WILLYS-OVERLAND, INC.), PETITIONER

[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

BRIEF FOR THE [illegible]



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 738

GENERAL MOTORS CORPORATION (AS TRANSFEREE IN COMPLETE LIQUIDATION OF WALTER J. BEMB, INC.), PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 21–27) is reported in 35 F. Supp. 466.

JURISDICTION

The judgment of the Court of Claims was entered November 12, 1940 (R. 27). The petition for a writ of certiorari was filed February 1, 1941 (R. 27). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

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QUESTION PRESENTED

Whether the capital stock tax provisions of the National Industrial Recovery Act and of the Revenue Act of 1934 are unconstitutional.

STATUTES INVOLVED

The applicable statutory provisions are set forth in the Appendix to the Government's brief in opposition in the case of *United Motor Service, Inc.* v. *United States,* No. 739, this Term.

STATEMENT

The court below decided this case upon the petition and demurrer thereto (R. 21). From the petition, the following facts appear:

Petitioner, a corporation, is the successor to Walter J. Bemb, Inc., which, during the taxable periods, was engaged in the business of selling automobiles, parts, and accessories, and servicing automobiles (R. 1). Walter J. Bemb, Inc., was organized as a corporation on May 5, 1933, and commenced to do business on May 20, 1933 (R. 3).

Prior to the time for filing the capital stock tax return of Walter J. Bemb, Inc., for the year ending June 30, 1933, it was estimated that earnings of 30% on invested capital could be expected. However, hoping that business conditions would improve, it was determined to declare a value for capital stock tax purposes which would permit net earnings of approximately 50% on the in-

vested capital in any year without incurring any liability for the excess profits tax. The same method was used in determining the value to be declared for the year ended June 30, 1934. The capital stock tax value was accordingly declared on the return for the year ended June 30, 1933, in the amount of $500,000, and for the year ended June 30, 1934, in the amount of $544,000 (R. 4).

Walter J. Bemb, Inc., filed capital stock tax returns for the years ending June 30, 1933 and 1934, showing the above values for its capital stock, and paid the taxes shown thereon to be due. It later filed timely claims for refund, asserting that the statutory provisions imposing the capital stock tax were unconstitutional because, among other reasons, the tax was retrospective in its application and because the declaration of value for one year was binding for other years (R. 4–5, 9–12). The claims for refund were rejected (R. 5), and the present action was then begun. The Government's demurrer to the petition was sustained by the Court of Claims (R. 27).

ARGUMENT

This case involves the same question as is presented in *United Motor Service, Inc.* v. *United States,* No. 739, present Term. Reference is accordingly made to the Government's brief in opposition in that case for a statement of the grounds upon which we oppose the granting of a writ in this case.

CONCLUSION

The petition should be denied.
Respectfully submitted.

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MARCH 1941.

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